EX PARTE OR LATE FILED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum to the Mobile-Satellite Service above 1 GHz for Low-Earth Orbit Satellites -- Requests for Pioneer's Preference by Constellation, Ellipsat, Loral, Motorola, and TRW.	ET Docket No. 92-28 PP-29 PP-30 PP-31 PP-32 PP-33

To: The Commission

OPPOSITION TO MOTION FOR STAY

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SUMMARY

Motorola Satellite Communications, Inc. ("Motorola") urges the Commission to deny the Motion for Stay submitted by TRW Inc. ("TRW") and reject TRW's request for a stay of all proceedings on the pending pioneer's preference requests in this docket until such time as the Commission acts on TRW's petition for further reconsideration in the pioneer's preference proceedings.

TRW has failed to demonstrate that a stay is warranted under the four-part standard from Cuomo v. U.S. Nuclear Regulatory Commission, 772 F.2d 972 (D.C. Cir. 1985), which it cites. As a threshold matter, TRW is extremely unlikely to prevail on the merits for two reasons. First, there is no merit to TRW's assertion that the Commission's pioneer's preference rules conflict with the Supreme Court's holding in Ashbacker Radio Corp. v. FCC, 326 U.S. 327. The Commission clearly has the authority to adopt new eligibility criteria and apply such criteria retroactively to pending applications. Second, TRW's petition for further reconsideration is procedurally flawed, because it addresses issues not modified in the Commission's Order on Reconsideration, 7 FCC Rcd 1808 (February 26, 1992). By the terms of Section 1.429 of the Rules, TRW's petition is repetitious and should not even be accepted by the Commission for comment.

Further, TRW would not be irreparably harmed if the Commission awards a tentative pioneer's preference to one of its

competitors in this proceeding. A tentative preference is only preliminary, and TRW and each of the other applicants will have ample opportunity to comment before a final preference is granted.

Motorola, however, would be harmed by additional delay in this proceeding. Motorola is entitled to a pioneer's preference for its IRIDIUM™ system, and further delay could seriously prejudice Motorola's program.

Finally, the public interest in this instance lies with the expeditious resolution of this proceeding and the award of the pioneer's preference at the earliest opportunity. A stay at this juncture will thwart a primary purpose of the pioneer's preference rules: the introduction of innovative services and technologies.

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To: The Commission

OPPOSITION TO MOTION FOR STAY

Motorola Satellite Communications, Inc. ("Motorola") hereby files its Opposition to the Motion to Stay submitted by TRW, Inc. ("TRW") in the above-captioned proceedings. TRW requests a stay of all proceedings on the pending pioneer's preference requests until such time as the Commission acts on TRW's petition for further reconsideration in the pioneer's preference rulemaking proceedings.[1/] TRW's last request for further delay of the Commission's normal processes is an implicit recognition of the lack of merit of its own pioneer's preference

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1/ See Petition for Further Reconsideration in GEN Docket No. 90-217, Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services (filed April 6, 1992) ("Pioneer's Preference Proceedings").

request in this proceeding, and an obvious attempt to prevent Motorola from receiving the pioneer's preference it deserves for the innovative technologies and services associated with the IRIDIUM™ system. Accordingly, the Commission must deny TRW's stay request.

I. OVERVIEW

TRW has not demonstrated that a stay is warranted of these proceedings under the four-part test set forth in Cuomo v. U.S. Nuclear Regulatory Commission, 772 F.2d 972, 974 (D.C. Cir. 1985) (originally enunciated in Virginia Petroleum Jobbers, 259 F.2d 921 (1958), and Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977)). A party moving for a stay must show:

(1) the likelihood that it will prevail on the merits;

(2) the likelihood that it will be irreparably harmed absent a stay;

(3) the prospect that others will not be harmed if the agency grants the stay; and

(4) the public interest in granting the stay.

772 F.2d at 974.

TRW is extremely unlikely to succeed with its related petition for further reconsideration of the Pioneer's Preference Proceedings. First, there is absolutely no merit to TRW's assertion that the Commission's pioneer's preference rules conflict with the Ashbacker doctrine.[2/] Contrary to the claims

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[2/] See Ashbacker v. F.C.C., 326 U.S. 327 (1945).

of TRW, the Commission clearly has the authority to adopt by rule new eligibility criteria and apply such criteria retroactively to pending applications as it determined in its report and order.[3/] TRW's petition for further reconsideration is also procedurally defective and should be dismissed because it raises issues, for the first time, which were not raised or addressed on reconsideration in the Pioneer's Preference Proceedings. See 47 C.F.R. § 1.429(i) (1991).

TRW's claims of irreparable harm if the Commission awards a tentative preference to one of its competitors in this proceeding also lacks merit.[4/] Any preliminary determination would only result in the award of a tentative preference. TRW and each of the other applicants then would have ample opportunity to comment on the tentative award before the Commission granted a final preference. A "tentative" award of a pioneer's preference is inherently incapable of causing irreparable injury.

Motorola, on the other hand, would certainly be harmed by any additional processing delays. Motorola is entitled to a pioneer's preference for the innovations associated with its IRIDIUM™ system, and any further delay in the award of a tentative preference could prejudice Motorola's program.

[3/] 6 F.C.C. R.cd 3488 (May 13, 1991).

[4/] Of course, TRW fails to mention that it too has requested the Commission to award it a pioneer's preference in this proceeding. Clearly, TRW must view its chances of receiving such a preference as remote.

Finally, the public interest lies with the expeditious resolution of this proceeding and the award of a pioneer's preference at the earliest opportunity. One of the primary purposes of the pioneer's preference rules is to reward innovators for proposing new ideas relating to the radio spectrum. A stay of this proceeding would be the antithesis of reasoned decisionmaking and would retard, rather than promote, the introduction of innovative services and technologies.

II. TRW IS NOT LIKELY TO SUCCEED ON THE MERITS

A. TRW's Ashbacker Arguments Are Unpersuasive and Not Likely to Result in any Changes in the Pioneer's Preference Rules

TRW maintains that the Commission has inadequately considered a possible conflict between the holding in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), and the pioneer's preference rules. In essence, TRW claims that the award of a definitive preference to one applicant based solely upon rules which were not in place at the time of the submission of the underlying applications, would impermissibly impose new qualifying standards in violation of the asserted hearing rights of the other applicants. As Motorola has already pointed out in its Reply Comments in this proceeding,[5/] the award of a pioneer's preference to Motorola would not deny any hearing rights associated with other pending applications. The courts

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[5/] See Motorola's Reply Comments, at 6-7 (April 23, 1992).

long ago have held that the Commission has the authority to establish eligibility requirements by rule, both before and after applications have been filed, which have the effect of eliminating or reducing the number of applicants.

Under the Communications Act of 1934, as amended, the Commission is broadly empowered to act consistent with the "public convenience, interest, or necessity." Among the powers granted the Commission is the allocation of specific parts of the radio spectrum to uses such as satellite transmissions. See 47 U.S.C. § 303 (1988). Pursuant to this authority, it is well-settled that the Commission can utilize its rule-making power to alter rules which govern or impact pending applications. In United States v. Storer Broadcasting Co., 351 U.S. 192, 202 (1956), the Supreme Court held that the Commission, by general rule, can establish substantive eligibility criteria for applicants after the applications had been filed, thereby retroactively rendering a current applicant unacceptable.[6/] Observing that "[t]he growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized agencies with broad powers," the Court recalled

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[6/] This finding was consistent with the Court's previous pronouncement in Ashbacker Radio Corp. v. FCC, 326 U.S. at 333 (1945), that Section 309 of the Communications Act requires the Commission to hold a comparative hearing for all "bona fide" mutually exclusive applications which present "substantial and material questions of fact." The Storer Court cited Ashbacker for its implicit approval of the Commission's power to promulgate rules governing applicants' eligibility. Storer, 351 U.S. at 202 n.11. The Ashbacker Court had observed that "[a]pparently no regulation exists which, for orderly administration, requires an application . . . to be filed within a certain date." Ashbacker, 326 U.S. at 333 n.9.

its previous attention to the "necessity for flexibility" in rule-making. Id. at 203-04.

Recent decisions have reiterated the underlying principle established in Storer that the Commission can promulgate rules which retroactively impact on pending applications. Thus, the D.C. Circuit has upheld the imposition of a post-application rule change granting a preference to a local applicant. Hispanic Info. and Telecommunications Network, Inc. v. FCC, 865 F.2d 1289, 1294 (D.C. Cir. 1989). The court observed in that case that "if the substantive standards change so that the applicant is no longer qualified, the application may be dismissed." Id. at 1294-95.

Similarly, the D.C. Circuit affirmed the Commission's application of a lottery procedure to applicants who believed they would receive a comparative hearing for their cellular radio applications. Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1554-55 (D.C. Cir. 1987). "[R]etroactive enforcement of a rule is improper only if 'the ill effect of the retroactive application' of the rule outweighs the 'mischief' of frustrating the interests the rule promotes." Id. (citing SEC v. Chenery Corp., 332 U.S. 194, 203 (1947)). In that case the applicant had argued that the decision to implement a lottery caused it unnecessarily to incur the costs of filing a comparative application and to fail to file additional applications given the relative ease of consideration under a lottery system. Id. at 1555. The court held, however, that the "ill effect" of the retroactive application of the lottery procedure to the applicant

was "little or none," compared with the excessive delays and costs the Commission would incur if forced to utilize comparative hearings. Id.

Moreover, in numerous satellite proceedings the Commission has not hesitated to promulgate qualifying rules and apply them retroactively to pending applications. See, e.g., RDSS Licensing Order, 104 F.C.C. 2d 650 (1986) (Commission established modulation scheme which precluded an applicant in the RDSS bands from operating); Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Mobile Satellite Service for the Provision of Various Common Carrier Services (Tentative Decision), 6 FCC Rcd. 4900, 4903 ¶ 15 (1991) ("MSS Tentative Decision") (on remand from Aeronautical Radio, Inc. v. FCC, 928 F.2d 428 (D.C. Cir. 1991), where the Commission determined it was authorized to impose a mandatory consortium requirement on applicants whose applications were pending when the rule was promulgated, observing that the ownership rule at issue in Storer "also was applied to an application that had been filed prior to the rule's adoption"), aff'd, 7 FCC Rcd. 266 (1992) ("MSS Final Decision"); Domestic Fixed Satellite Services, 58 R.R.2d 1267 (P&F) (1985), aff'd Columbia Communications v. Federal Communications Commission, 832 F.2d 189 (1987) (Commission established more stringent financial qualifications standards two years after the cut-off date for accepting applications).

In its efforts to delay this proceeding at any cost, TRW has ignored this long line of Court and Commission precedent.

B. TRW'S Petition for Reconsideration is Procedurally Defective

Section 1.429 of the Rules provides that "[a] petition for reconsideration which relies on facts which have not previously been presented to the Commission will be granted only" if (1) facts have changed since the last opportunity to present them, (2) the facts relied on were unknown to the petitioner, or (3) the Commission determines that consideration of the facts relied on is required in the public interest. 47 C.F.R. § 1.429(b) (1991). Section 1.429(i) states that a reconsideration order which modifies rules adopted by the original order is subject to further reconsideration only "to the extent of such modification." 47 C.F.R. § 1.429(i).

In its motion, TRW concedes that the Commission has already considered its Ashbacker arguments both in its notice of proposed rulemaking and the subsequent report and order in the Pioneer's Preference Proceedings.[7/] TRW also must admit that the arguments it now raises were not the subject of any of the petitions addressed on reconsideration in the Pioneer's Preference Proceeding.

Nevertheless, TRW argues that the Commission should once again revisit its unsupported Ashbacker arguments, because

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7/ See Motion for Stay, at 4; Petition for Reconsideration, at 3-5.

such further analysis would be in the public interest.[8/] This argument is simply untenable. TRW has offered no new or changed facts to justify reexamining an argument the Commission has already considered and rejected. Nor does TRW justify its failure to raise this issue when petitions for reconsideration were first due.

It would be entirely inappropriate for the Commission to consider granting TRW's stay on the basis of a procedurally defective petition for reconsideration.

III. TRW WOULD NOT BE IRREPARABLY HARMED IF ITS STAY REQUEST IS DENIED

TRW has not identified any irreparable harm to it if its requested stay is denied. Any preliminary determination as to the award of a preference during the pendency of TRW's further petition for reconsideration of the pioneer's preference rules will not harm TRW. Contrary to the assertions of TRW, the Commission is not on the verge of granting any of the applicants in this proceeding a dispositive preference. Under the pioneer's preference rules, the final award of a such a preference must await further comment in any future rulemaking proceeding.

Nor is it correct to assert that the award of a preference to Motorola or any of the other applicants would deprive the remaining applicants of their Ashbacker rights. As Motorola has repeatedly pointed out in this proceeding, the award

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[8/] TRW has made no showing as to why a waiver of the Commission's procedural rules would be warranted in this case.

of a preference to it would not preclude the licensing of one or more other systems. Indeed, as many as two other systems could be accommodated in the remaining portions of the RDSS bands.

IV. MOTOROLA WOULD BE SERIOUSLY HARMED BY GRANTING TRW ITS STAY REQUEST

Motorola would be seriously harmed if the Commission were to grant TRW's stay motion. Of all of those applicants who have requested a pioneer's preference in this proceeding, Motorola is the only one that truly deserves a pioneer's preference for the innovations associated with its system design.[9/] Thus, any delay in the award of a preference in this proceeding would directly work to Motorola's disadvantage.

TRW concedes that any significant delay would be tantamount to potential lost customer base and increased international coordination difficulties.[10/] Several other satellite systems recently have been proposed by foreign administrations and international organizations. Many other foreign administrations have already started the international coordination process. Absent prompt action in this proceeding, there is the distinct possibility that any U.S. licensee might receive its authorization too late to effectively compete in the marketplace and coordinate its system internationally.

9/ See Motorola's Comments (April 8, 1992); Motorola's Reply Comments (April 23, 1992); Motorola's Supplement (April 10, 1992).

10/ See Motion for Stay, at 10.

V. THE PUBLIC INTEREST WOULD BE SERVED BY DENYING TRW'S MOTION TO STAY

The public interest rarely is served by delay. This is especially the case in this proceeding where the Commission will be analyzing which of the applicants should receive a pioneer's preference as a reward for the innovations associated with its system design. The Commission established the pioneer's preference rules in order to create incentives for the early introduction of new and innovative services and technical proposals which better utilize the limited frequency spectrum. Further delay would only frustrate the underlying purposes of these rules.

Furthermore, as previously mentioned, it is imperative that the Commission act expeditiously in order to ensure that the U.S. licensees in the RDSS bands will be able to coordinate their respective systems internationally. The public interest would not be served by any further delays in the introduction of U.S. licensees into the global marketplace.

VI. CONCLUSION

For the foregoing reasons, the Commission must deny TRW's motion to stay these proceedings.

Respectfully submitted,

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May 12, 1992

CERTIFICATE OF SERVICE

I, Philip L. Malet, hereby certify that the copies of the foregoing Opposition to Motion for Stay were served by first-class mail, postage prepaid, this 12th day of May, 1992, on the following persons:

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